BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES E. UITTS	)	
Claimant	)	
	)	
VS.	)	
	)	
WHITAKER CONSTRUCTION, INC.	)	
Respondent	)	Docket No. **1,030,468**
	)	
AND	)	
	)	
TRAVELERS CASUALTY & SURETY CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 16, 2013, Award Upon Remand From The Appeals Board[1] by Special Administrative Law Judge (SALJ) John C. Nodgaard. The Board heard oral argument on May 7, 2013.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. William L. Townsley III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The SALJ found claimant sustained a traumatic hernia as a result of his work-related accident on June 13, 2006, but that claimant did not sustain permanent injury or disability to his low back.

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[1] This claim was previously before the Board on appeal from an award entered by SALJ John Nodgaard dated July 30, 2012. By Order of the Board dated January 10, 2013, that award was vacated and the claim was remanded with directions to consider the entire record, including the report of the neutral examining physician, Dr. Eyster.

Claimant contends the SALJ erred in finding he sustained no permanent injury and no permanent functional impairment to his low back. Claimant maintains, based on Dr. Prostic's opinions, he suffered permanent total disability or, in the alternative, an 89% work disability, consisting of a 100% wage loss and a 78% task loss.

Respondent argues the SALJ's Award Upon Remand should be affirmed.

The issues are:

1. Did claimant sustain permanent injury to the low back?

2. What is the nature and extent of claimant's disability, if any?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant described his job for respondent as a full-time tire handler as follows:

> The tires come in in [sic] a semi trailer and they are layered at an angle back and forth all the way to the top and you have to pull them out, off the top with a long bar to get them down and then carry them out and put them on the conveyor belt.[2]

Claimant would then go back to the trailer to get more tires. The tires were automobile and pickup tires weighing from 20 to 50 pounds each and were used as fuel to make cement.

Claimant is 82 years old. He did not complete high school. Claimant served in the Air Force and received on-the-job training in aircraft and engine mechanics. He worked as an attendant for a Texaco gas station for 15 years. Claimant had retired about three years before he started working for respondent in 2002.

On June13, 2006, claimant was removing tires from the top of an eight foot stack when he experienced pain in his abdomen and back. As he continued working, the pain increased until he was no longer able to continue.

Claimant was treated at the Allen County Hospital emergency room (ER) by Dr. Gordon Sipkens, who determined claimant was in need of hernia surgery and referred him

[2] R.H. Trans. at 16.

to his regular doctor. Although claimant testified he told hospital personnel on the day of the accident about his back pain, the ER records do not document any complaints of low back pain.

On June 21, 2006, claimant underwent surgery by Dr. Richard Hull consisting of an umbilical hernia repair. Dr. Hull's treatment records from June 14, 2006, through August 2, 2006, document no complaints of back pain.

Claimant filed an application for hearing with the Kansas Workers Compensation Division on August 18, 2006, in which he alleged that performing his job duties caused injuries consisting of "[g]eneral bodily disability back, hernia, and all other parts of the body affected."

A preliminary hearing was held on December 13, 2006. The parties stipulated on the record that the ALJ should consider claimant's November 29, 2006, deposition testimony as evidence in the preliminary hearing. No other evidence was presented. The issue raised at the hearing was whether claimant should be awarded "medical treatment of an orthopedic surgeon."[3]

The ALJ entered a preliminary hearing Order on January 3, 2007, in which he found that Dr. Do was the authorized treating physician.

On January 31, 2007, claimant was seen by Dr. Pat Do for evaluation and treatment of low back pain. Dr. Do ordered x-rays and prescribed medication, physical therapy and steroid injections. Claimant's pain improved, but returned.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on May 16, 2007, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Prostic found claimant had tenderness of the left lower lumbar paraspinous muscles and mild bilateral hamstring tightness. X-rays of the lumbar spine revealed degenerative disk disease at multiple levels. Dr. Prostic diagnosed a low back injury and an umbilical hernia. The doctor recommended claimant undergo a bone scan to rule out other sources of pain. Dr. Prostic recommended intermittent heat, ice, massage, therapeutic exercises and anti-inflammatory medications.

[3] P.H. Trans. at 4.

Based on the AMA *Guides*,[4] Dr. Prostic rated claimant's permanent functional impairment at 10% to the body as a whole for chronic sprain and strain of the lumbar spine with significant loss of motion.

Dr. Prostic imposed permanent physical restrictions of no lifting greater than 30 pounds occasionally from knee to shoulder, no lifting weights above shoulder height or below knee height, no frequent bending or twisting at the waist, no forceful pushing or pulling, no more than minimal use of vibrating equipment and avoid captive positioning.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Karen Terrill, a vocational counselor, and concluded claimant could no longer perform 7 of the 9 tasks for a 78% percent task loss. The doctor opined claimant was permanently and totally disabled from engaging in any substantial and gainful employment.

After testifying by deposition on September 29, 2008, Dr. Prostic received additional medical records of Drs. Richard Hull and William Bailey; Allen County Hospital; x-rays and MRI findings from Dr. Kevin Hughes; and chiropractic records from Chanute Chiropractic.

Dr. Prostic was again deposed on May 11, 2009. His review of the additional medical records did not change his rating and diagnoses but instead reinforced his opinions. The doctor testified that claimant's 10% impairment was over and above any preexisting disease in the low back and was attributable to the work-related accident.

On August 27, 2007, the ALJ ordered an independent medical examination by Dr. Robert Eyster, an orthopedic specialist. Dr. Eyster found claimant walked with a mild antalgic gait on the left side and had tenderness but no muscle spasms in the lower back. The doctor diagnosed lumbar degenerative disk disease that preexisted claimant's work injury but was aggravated by the injury. He rated claimant's permanent impairment of function at 5% to the whole body for the work-related low back injury. Dr. Eyster imposed restrictions of no lifting greater than 50 pounds in a single lift or 25 pounds repetitively and avoid repetitive forward bending.

Karen Terrill interviewed claimant on December 12, 2007, and September 17, 2008, at the request of claimant's attorney. She prepared a list of 9 non-duplicated work tasks claimant performed in the 15-years before his injury and the physical demands associated with each task. Claimant was not working when he was interviewed. Ms. Terrill opined that based on claimant's age and his formal education, he was realistically unemployable in the open labor market.

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Dr. John McMaster, board certified in family practice and emergency medicine, evaluated claimant on June 20, 2009, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. McMaster diagnosed a repaired incarcerated umbilical hernia and lumbosacral degenerative disk disease.

Based upon the AMA *Guides*, Dr. McMaster rated claimant's hernia at not greater than a 10% permanent impairment of function to the whole body. Dr. McMaster opined:

> Based upon a reasonable degree of medical certainty, the records which predated and are contemporaneous with this occupational incident represent indisputable medical evidence to suggest that this examinee suffered no exacerbation or aggravation of his pre-existing low back condition as a result of this occupational incident.[5]

Dr. McMaster testified claimant sustained no permanent impairment due to his alleged low back injury on June 13, 2006. His opinion was based on his review of claimant's medical records, which do not reflect any causal relationship between his chronic low back pain and the accident. The doctor opined that claimant had received medical treatment for many years for his low back pain before the accidental injury. Dr. McMaster testified:

> Q. And with respect to the alleged low back pain, did you find anything in the contemporaneous medical records after June 13th, 2006, when the umbilical hernia was diagnosed that reflected that the claimant was also complaining of low back injury at that time?
>
> A. The first entry with respect to low back pain after June 13, 2006, that I found reference to or identification of a low back complaint was on January 31st, 2007, at which time he was evaluated by Dr. Do.[6]

Dr. McMaster reviewed the list of claimant's former work tasks prepared by Ms. Terrill and concluded, with respect to claimant's accidental injury on June 13, 2006, claimant required no permanent restrictions and suffered no task loss.

Sandra Whitaker, respondent's vice president, testified that the tires claimant lifted weighed somewhere between 12.5 to 36 pounds each. Ms. Whitaker testified that claimant advised her on June 13, 2006, that he had abdominal pain and needed to go to the

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[5] McMaster Depo., Ex. 2 at 12.

[6] *Id*. at 17.

hospital. Claimant stopped by Ms. Whitaker's office to let her know that he had an umbilical hernia. Ms. Whitaker testified that claimant did not mention any problems with low back pain:

> Q. During any of those conversations did Mr. Uitts ever tell you that he had injured his back while working as a tire handler for Whitaker Construction?
>
> A. No.[7]

PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) provides in part:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2005 Supp. 44-510d provides in relevant part:

> (a) If there has been an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to paid for not to exceed the number of weeks allowed in the following schedule:
>
> . . .
>
> (22) For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i and amendments thereto, compensation for temporary total disability during such period of time as such employee is unable to work on account of such hernia, . . .
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

[7] Whitaker Depo. at 28.

> (b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive for all other compensation . . . and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, ...

K.S.A. 2005 Supp. 44-510e(a) provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9]

ANALYSIS

There is no dispute that claimant sustained a compensable personal injury by accident, arising out of and in the course of his employment, on June 13, 2006. The accident occurred when claimant was lifting tires and the injury consisted of, at a minimum, an umbilical hernia. The parties disagree, however, on the issue of whether the accident

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

did or did not also cause an injury to the lumbar spine. The SALJ determined claimant sustained only a hernia as a consequence of the accident and not an injury to the lumbar spine.

The Board agrees with the SALJ and adopts his conclusions for the following reasons:

1) Claimant testified he experienced low back pain, in addition to abdominal pain, on June 13, 2006, when lifting tires. Claimant testified he told hospital personnel on the day of the accident about his back pain, but there is no reference to low back pain in the ER records.[10] Claimant was treated by Dr. Hull for a period of almost two months commencing on June 14, 2006, but there is no reference to low back complaints in Dr. Hull's records. There are no documented low back complaints to a medical provider until January 31, 2007, (claimant's initial appointment with Dr. Do), more than seven months after claimant's accident. If claimant injured his low back on June 13, 2006, low back pain would likely be noted in the medical records before January 2007.

2) Claimant testified he had no low back pain or problems before June 13, 2006. Claimant told Dr. Prostic he had no prior difficulties with his low back. However, the record shows:

(a) On October 8, 2003, claimant was diagnosed by Mr. Walter, a physician's assistant with Dr. Hull, with left lumbar radiculopathy.

(b) Claimant experienced back pain radiating into the left hip and underwent a lumbar MRI scan on November 21, 2003, which revealed degenerative disk disease producing narrowing of the entire thoracolumbar spine with paracentral bulges at L4-5 and L5-S1.

(c) On December 1, 2003, claimant was seen by Mr. Walter for left lumbar radiculopathy.

(d) On December 15, 2003, claimant consulted Mr. Walter for left lumbar radiculopathy.

(e) On June 3, 2005, claimant was seen by Mr. Lesher, also a physician's assistant with Dr. Hull, for low back pain and muscle spasm.

[10] The records from Allen County Hospital contain a document dated June 21, 2006 (the date of claimant's hernia surgery) entitled "PRE-ANESTHESIA QUESTIONNAIRE." The questionnaire, completed by a nurse Jefferson, inquires "Do you have back or neck pain?" The "Yes" box is marked with an "X" and the handwritten response is "sciatic nerve (Oct.)," which is presumably a reference to October 2005.

(f) On September 30, 2005, claimant saw Dr. Hull for complaints of low back pain, spasms and bilateral hip pain.

(g) Claimant visited the Allen County Hospital ER on October 2, 2005 for acute sciatica.

(h) Claimant received 33 chiropractic treatments from October 2005 through November 2006.[11]

(I) Claimant consulted Dr. Hull on October 13, 2005, for complaints of radicular back pain. Dr. Hull ordered a lumbosacral CT scan.

(j) Claimant underwent a lumbar CT scan on October 14, 2005, which revealed significant degenerative disk disease and degenerative joint disease producing severe neuroforaminal stenosis.

(k) On October 25, 2005, claimant consulted with Dr. Bailey, an orthopedic specialist, who diagnosed lumbar radiculitis secondary to spinal stenosis.

(l) On November 10, 2005, claimant received a lumbosacral epidural steroid injection.

(m) On June 9, 2006, just four days before the accident, claimant was seen by Mr. Walter for complaints of neck and back pain for which hydrocodone was prescribed along with over-the-counter ibuprofen.[12]

It is improbable claimant could have forgotten his lengthy history of low back and radicular symptoms.

3. Claimant talked to Sandra Whitaker more than once following the accident but claimant failed to mention anything to her about back pain or injury.

4. It was unclear at best whether Drs. Eyster and Prostic had access to the same history and medical documentation which was provided to Dr. McMaster. Certainly, Dr. Prostic was provided an inaccurate past history by claimant. In opining that claimant's accident served to aggravate claimant's preexisting degenerative disease, Dr. Eyster

[11] McMaster Depo., Ex. 2 at 3. The chiropractic records are not in evidence.

[12] With exception of the reference to chiropractic records, all references in paragraphs (a) through (m) above are documented in the medical records stipulated into evidence on January 4, 2010.

assumed claimant was asymptomatic before the accidental injury. That assumption has no validity based on the evidence in this record.

5. Under the circumstances of this claim, the opinions of Dr. McMaster are more credible and persuasive than the other medical opinions in evidence. Dr. McMaster testified claimant's low back pain was unrelated to the accident and was instead a consequence of claimant's preexisting lumbar degenerative disease. Dr. McMaster opined claimant sustained no permanent functional impairment associated with the accident for low back pain. Given the state of claimant's lumbar spine before the accident and his pre-injury low back and radicular symptoms, Dr. McMaster's opinions are provided more weight than those of Drs. Prostic or Eyster.

In addressing the concerns expressed in the dissenting opinion, the majority of the Board respectfully note:

1. Claimant mentioned nothing to a medical provider of low back injury or symptoms until he first saw Dr. Do in January 2007. The application for hearing filed on August 18, 2006, contains an allegation of low back injury. Also, claimant testified at his deposition on November 29, 2006, that he injured his back in the June 13, 2006 accident.[13] However, claimant's allegations of back injury are not reliable in view of:

(a) claimant's testimony that he suffered no back pain before June 13, 2006.[14]

(b) claimant's testimony that he suffered from only radicular pain, not back pain, before the accident.[15]

(c) claimant's denial to Dr. Prostic of any previous difficulties with his low back.[16]

2. Contrary to the dissenting opinion, the records of Drs. Hull and Sipkens are in evidence, pursuant to a stipulation of medical records filed with the Division on January 24, 2010. Those records contain no reference to low back injury, current complaints of low back pain or radicular pain.

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[13] Uitts Depo. at 16.

[14] *Id.* at 20, 24; R.H.Trans. at 19, 26.

[15] *Id*. at 54.

[16] Prostic Depo. (Sep. 29, 2008), Ex. 1 at 1.

3. Dr. McMaster testified claimant required no permanent restrictions and sustained no task loss as a result of the accidental injury of June 13, 2006.[17]

4. Claimant's advanced age and history of prior degenerative disk disease are not subject to being compensated under the Act. The issue here is whether claimant proved a permanent work-related injury or a permanent aggravation of his preexisting condition.

5. It is uncertain exactly what records Dr. Eyster reviewed. The first paragraph of his report indicates he reviewed records from a number of medical providers. However, claimant was seen by all of the medical providers listed in Dr. Eyster's report both before (with the exception to Dr. Do) and after the accident. It is unclear the extent to which Dr. Eyster was provided with medical records preexisting the accident. Dr. Eyster, who was not deposed, mentioned nothing about having reviewed the 2005 lumbar CT scan, nor did he mention claimant's visit with Mr. Walter just four days before the accident for neck and back pain. Dr. Eyster's opinions are erroneously based on the assumption that claimant "was not symptomatic prior to the injury."[18]

6. The dissenting opinion seems to suggest that Dr. Eyster's opinions should be accorded more weight than the opinions of the other medical experts simply because he was appointed as a neutral physician. However, the Act only requires that a report of a neutral physician be considered by the SALJ, not that it be regarded as conclusive.[19]

CONCLUSIONS OF LAW

1. Claimant did not sustain permanent injury to his low back.

2. Claimant is entitled only to the compensation set forth K.S.A. 2005 Supp. 44-510d(a)(22)(23) and (b).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[20] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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[17] McMaster Depo. at 18-20; Ex. 2 at 11.

[18] Dr. Eyster's Sep. 20, 2007 report at 3.

[19] K.S.A. 2005 Supp. 44-516.

[20] K.S.A. 2005 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the Award of SALJ John C. Nodgaard dated January 16, 2013, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority ruling that claimant failed to prove that he sustained a back injury by accident arising out of and in the course of his employment with respondent.

In his Application for Hearing filed on August 20, 2006, claimant alleged a hernia and back injury. At a preliminary hearing on December 13, 2006, claimant requested additional medical treatment. The parties agreed the SALJ could review claimant's deposition transcript and then determine if claimant's request for medical treatment would be granted. At the deposition, claimant testified that he unloaded tires for respondent from 2002 through the date of his accident. The job required claimant to take tires weighing from 20 to 50 pounds from the back of a trailer and place them on a conveyor belt. Claimant testified that when he pulled a tire from a stack of tires, he felt pain in his abdomen and back. Claimant testified that he saw Dr. Sipkens on June 13, 2006, in the emergency room for a hernia and back problems.

After reviewing the deposition transcript, ALJ Klein issued an Order appointing Dr. Do for treatment, tests and referrals. Claimant complained of having back problems the first time he saw Dr. Do on January 31, 2007. Therefore, the assertion that the first complaint of back pain to a medical provider was on January 31, 2007, does not paint a true picture of events. Claimant asserted a back injury when he initially filed his Application for Hearing and requested treatment for his back at a preliminary hearing. He told Drs. Sipkens and Hull of his back injury. That testimony is undisputed, as neither of those physicians testified.

Drs. Prostic, Eyster and McMaster examined claimant and rendered opinions as to whether claimant's back injury was work related. The majority understandably is leery of Dr. Prostic's opinion. Dr. Prostic, without being aware of claimant's history of back problems, opined claimant's back injury was work related. After learning of claimant's extensive history of back issues, Dr. Prostic opined that the 10% functional impairment he assigned claimant was over an above his preexisting impairment and was attributable to claimant's June 13, 2006 accident.

At the other end of the spectrum is Dr. McMaster's opinion that claimant's preexisting back condition was not aggravated or exacerbated by the accident. Dr. McMaster acknowledged he was told by claimant that he had been previously treated for back symptoms by his family physician, an orthopedic physician and a chiropractor. This Board member finds Dr. McMaster's opinions are not credible. Claimant is an 82-year-old man who injured himself when removing tires from the top of an 8-foot stack. Despite the fact that claimant had a hernia and lumbar disk disease, Dr. McMaster opined claimant had no permanent impairment, no work restrictions and no task loss. This Board Member might have found Dr. McMaster's opinions credible had he determined claimant did not aggravate or exacerbate his preexisting lumbar degenerative disk disease, but then opined claimant had some permanent restrictions and task loss. It is difficult to imagine how an 82-year-old man with a history of lumbar degenerative disk disease would have neither permanent restrictions nor task loss.

This Board Member would adopt the opinions of the court-appointed physician, Dr. Eyster. He opined claimant's June 13, 2006 accident aggravated his preexisting lumbar degenerative disk condition. The doctor then assigned claimant a 5% whole body functional impairment for the lumbar spine that resulted from claimant's June 13, 2006 accident. Dr. Eyster's permanent restrictions of lifting no more than 50 pounds in a single lift, lifting no more than 25 pounds repetitively and avoiding repetitive forward bending are appropriate. Dr. Eyster's report indicated that he reviewed more than 200 pages of claimant's prior medical records. Claimant told Dr. Eyster of 2003 and 2005 episodes of back irritation. His report indicated that in 2005, claimant had lower back and right leg pain, saw an orthopedic doctor and had a single epidural that relieved the sciatic radicular pain. Dr. Eyster was well aware of claimant's prior back issues and took that in

consideration when rendering his opinions. To use an old expression, Dr. Eyster had no dog in this fight. Dr. Eyster was appointed by the ALJ to conduct an independent medical evaluation and his opinions should be given more weight than the medical experts employed by claimant and respondent.

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BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge